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No. 91-1510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL J. SULLIVAN,

Petitioner,

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I.

PETITIONER HAS FAIRLY STATED ALL RELEVANT FACTS

The Respondent's attack on Petitioner's Summary of Facts is unjustified. Petitioner has consistently stated that he learned of a relationship between the trial judge's spouse and Respondent at the time of the Final Pretrial hearing in November 1988. Of course, when or how Petitioner learned of the relationship is unimportant since a Sect. 455(b) basis for disqualification cannot be waived.

Respondent's argument is based on its claim that the written waiver initialed during trial was *also* attached to the Final Pretrial Order when it was presented in November 1988. Petitioner submits that the written waiver was added to the Final Pretrial Order at the time of trial. If it *was* part of that Order in November 1988, why wasn't it typed consistent with the rest of the document or initialed by Mr. Acker, Petitioner's counsel present at the November 1988 Final Pretrial. Petitioner knows there is no handwritten waiver attached to his file copy of the Final Pretrial Order. There is no Record evidence, aside from Respondent's argument, of *when* the handwritten note was *added* to the typewritten Final Pretrial Order.

What is clear in both Summary of Facts is that:

a) Petitioner knew of the relationship in November 1988;

b) the handwritten waiver was initialed by trial counsel during trial in July 1989;

c) the Final Pretrial Order was signed by the trial judge on July 24, 1989, not in November 1988;

d) the handwritten waiver with the initials of trial counsel was made part of the Final Pretrial Order;

e) the trial judge never discussed, mentioned, or explained her spouse's relationship with Respondent at any time during the course of the litigation;

f) details of the relationship between Respondent and the trial judge's spouse have never been revealed;

g) neither Respondent nor the trial judge ever stated that the trial judge's daughter was also an attorney for Respondent.

Petitioner's Writ also attached his original Motion to Vacate (App. D, App. pg. 22) on which he states he was aware of the relationship at or about the time of the Final Pretrial in November 1988. Accordingly, the Petitioner's Summary of Facts is accurate and fair.

Petitioner wishes Respondent would be as concerned about full disclosure of its relationship with the trial judge's spouse as it professes to be about accuracy of the facts.

Respondent ignores an important issue—what are the *details* of its relationship with the spouse of the trial judge? What is Respondent hiding? If the relationship was truly minimal or insignificant, why not state the details.

Respondent's 22-page Brief in Opposition failed to, a) list the cases in which the trial court's spouse was representing Respondent, b) demonstrate any indication of the scope of the attorney/client or adviser/active participant relationship between Respondent and the trial court's spouse, and, c) reveal the amount of money paid to the trial court's spouse by Respondent during the pendency of this litigation. Yet Respondent, as well as the trial judge, know the true facts.

Instead, Respondent in Point IV argues that this Court should declare that 455(b) violations can be waived notwithstanding the clear language of the statute.

When the issue involves the integrity of justice in the United States Courts, Respondent should not be permitted to hide true facts it *knows*.

A violation of 28 U.S.C. 455(b) cannot be waived. The known facts of the relationship between Respondent and the trial court's spouse warrants review and reversal by this Court. In the alternative, other relief should be granted to determine the details of the relationship at issue.

Respectfully submitted,

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